

Chapter 15
Category 11j
Violation(s) of the Vacant Unit Rule
Under Reg. 1.42-5(c)(1)(ix)

Definition

This category is used to report violations of the Vacant Unit Rule (VUR); i.e., situations where an owner failed to make reasonable attempts to rent that unit, or the next available unit of comparable or smaller size, before renting units to tenants not having a qualifying income.

As part of the requirements for the annual certification, Treas. Reg. §1.42-5(c)(1)(ix) states, “If a low-income unit in the project became vacant during the year, that reasonable attempts were or are being made to rent that unit or the next available unit of comparable or smaller size to tenants having a qualifying income before any units in the project were or will be rented to tenants not having a qualifying income.”

Reasonable Attempts

As long as reasonable attempts are being made to rent to qualified low income households, vacant LIHC units will continue to be included as qualified low-income units for purposes of determining the minimum set-aside (IRC §42(g)(1)) and calculating the applicable fraction (IRC §42(c)(1)(B)). What constitutes reasonable attempts to rent a vacant unit is based on facts and circumstances, and may differ from project to project depending on factors such as the size and location of the project, tenant turnover rates, and market conditions. Also, the different advertising methods that are accessible to owners and prospective tenants would affect what would be considered reasonable.¹

Available Low-Income Unit Defined

The definition of an available low-income unit for purposes of the Vacant Unit Rule is the same as used for the Available Unit Rule. Treas. Reg. §1.42-15(c) states that a unit is not available when the unit is no longer available for rent due to contractual arrangements that are binding under local law. See Rev. Rul. 2004-82, Q&A #10.

Comparable Units

The definition of a comparable or smaller unit for purposes of the Vacant Unit Rule is the same as used for the Available Unit Rule; i.e., a residential unit that is comparably sized or smaller than the vacated unit. For deep rent skewed projects described in section 142(d)(4)(B), any low-income unit is considered a comparable unit. For purposes of determining whether a residential unit is comparably sized, a comparable unit must be measured by the same method used to determine qualified basis for the credit year in which the comparable unit became available. (See Treas. Reg. §1.42-15(a).) Since a comparable unit may need to be identified before the end of the year when the qualified basis is determined, an owner may consider a residential unit with similar square footage and amenities to be a comparable unit.

¹ Rev. Rul. 2004-82, Q&A #9.

In Compliance

A project is in compliance when reasonable attempts are made to rent vacant low-income units (comparably sized or smaller than the vacated units) to tenants having a qualifying income before any units are rented to nonqualifying tenants. A state agency's responsibility for reviewing the owner's compliance with the Vacant Unit Rule must include a review of the owner's advertising practices; i.e., a project will be considered in compliance when the owner makes reasonable efforts to rent vacant units to qualified low income households before renting any vacant units to nonqualifying tenants.

Example 1: Renting Market Rate Unit Before Low-Income Units²

Twenty market rate units and ten low-income units previously occupied by income-qualified tenants, in a 200-unit mixed-use housing project are vacant. None of the low-income units are over-income units. The owner displayed a banner and for rent signs at the entrance to the project, placed classified advertisements in two local newspapers, and contacted prospective low-income tenants on a waiting list for the project and on a local public housing authority's list of section 8 voucher holders. These are customary advertising methods for apartment vacancies in the area where the project is located. Subsequent to the low-income unit vacancies, a market rate unit of comparable size to the low-income units became vacant. The owner rents five market rate units before any of the ten vacant low-income units.

The owner is in compliance with the Vacant Unit Rule. The owner has used reasonable methods of advertising an apartment vacancy in the area of the project before renting a market rate unit. In addition, the Available Unit Rule is not violated by renting the market rate unit because there are no over-income units in the building.

A unit is not available for purposes of the vacant unit rule when the unit is no longer available to rent due to contractual arrangements that are binding under local law, such as a reservation entered into between a building owner and a prospective tenant.

Example 2: Low-Income Unit Not Available³

A building has 10 units, consisting of 7 low-income units (none was an over-income unit) and 3 market rate units. All units in the building were occupied except for one market rate unit.

A low-income unit became vacant on March 15, 2004, so the owner started advertising to rent the unit to an income-qualified tenant. On March 29, 2004 the owner agreed to rent the unit to an income-qualified household and the parties signed a reservation binding on both parties. The owner ceased advertising efforts for the low-income unit. The vacant market rate unit was rented on April 15, 2004. The low-income household signed their lease on April 30, 2004 and

² Rev. Rul. 2004-82, Q&A #9.

³ Rev. Rul. 2004-82, Q&A #10.

moved in on May 1, 2004.

Since a reservation had been signed for the vacant low-income unit at the time the market unit was rented, the low-income unit was not available for rent and, therefore, the owner no longer needed to make reasonable efforts to rent the low-income unit.

Out of Compliance

Noncompliance occurs when the owner does not make reasonable attempts to rent vacant low-income units and rents units to nonqualifying tenants. If the Vacant Unit Rule is violated, all vacant units previously occupied by qualified households lose their low-income status and are not considered qualified units. The date of noncompliance is the date the first low-income tenant moved out of the now vacant units.

Example 1: Owner Stopped Making Reasonable Efforts to Rent Low-Income Housing Units

The owner of a mixed-use LIHC project with 100 units stopped advertising efforts to attract low-income tenants on January 15, 2004. 15 of the 25 market rate units are vacant and 25 of the 75 low-income units are vacant at the time the state agency conducts a tenant file review. The LIHC units were vacated between September 25, 2003 and March 31, 2004.

The project is out of compliance is September 25, 2003, when the first currently vacant low-income unit was vacated.

Failure to Provide Information

If it is determined that an owner is not making reasonable attempts to rent vacant low-income units, the owner will need to provide the state agency a list of all vacant low-income units in the project. Under Treas. Reg. §1.42-5(b)(1)(v), owners are required to maintain records identifying vacant low-income units and information that shows, when, and to whom, the next available unit was rented. Failure to provide the needed information will result in a finding of noncompliance under 11f, Project failed to meet minimum set-aside requirement, because the owner has failed to establish that the minimum set-aside has been met.⁴ Under IRC §6001, every taxpayer is required to maintain records sufficiently detailed to prepare a proper tax return. This requires the maintenance of such permanent books and records sufficient to establish the amounts of gross income, deductions, *credits*, or other matters to be shown on the taxpayer's return. This requirement extends to the preparation and maintenance of records sufficient for demonstrating compliance with the Vacant Unit Rule.

⁴ The legislative history explains that vacant units formerly occupied by low-income individuals may continue to be treated as occupied by a qualified low-income individual for purposes of the set-aside requirement provided that the owner has not violated the vacant unit rule.

Addressing Violations

A project may return to its pre-violation status if a sufficient number of vacant units are rented to qualified low-income households.

Example 1: Owner Restored Applicable Fraction

The owner of a mixed-use LIHC project with 100 units stopped advertising efforts to attract low-income tenants on January 15, 2004. 15 of the 25 market rate units are vacant and 25 of the 75 low-income units are vacant. The LIHC units were vacated between September 25, 2003 and March 31, 2004.

The project violated the Vacant Unit Rule on September 25, 2003, when the first currently vacant low-income unit was vacated. The owner resumes advertising efforts on June 18, 2004, and rented 13 former market rate units and 12 out of compliance low-income units between June 30, 2004 and November 18, 2004 to income-qualified tenants. The building is restored to its pre-violation status when the last household, which restores the applicable fraction, moves into the building; i.e., November 18, 2004, when 75% of the units were restored to the status of low-income units.

References

1. Reg. 1.42-5(c)(I)(ix).
2. Rev. Rul. 2004-82, I.R.B 2004-350.